IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.970 OF 2004

Ravi @ Akash @ D.K.Rao Mallesh Bora)
Age-34 years, R/o. R.No.197,)
Mukundnagar, C-Ward, Dharavi,)
Mumbai-17. (At present in custody)
lodged in Mumbai Central Prison)..Appellant
(Org.Accused No.1)

Versus

The State of Maharashtra)
At the instance of Sr.P.I., Dadar)
Police Station)..Respondent

Mr.P.M.Pradhan with Kuldeep S.Patil & Mahesh Mule for the appellant.

Mr.K.V.Saste APP for the State.

Coram : R.S.Mohite,J

Date : 02.08.2006
and
03.08.2006.

Judgment :-

1. The appellant Ravi @ Akash @ D.K.Rao (hereinafter referred to as the "accused") has preferred this appeal impugning a judgment and order passed by the Additional Sessions Judge, Gr.Bombay, on 8.7.2004, in Sessions Case No.328/99 convicting the accused for offence punishable under Section 397 of IPC and sentencing him to suffer RI for 10 years and to pay a fine of Rs.3,000/-, in default, to suffer further RI for six months. The accused is further convicted under Section 332 of the IPC and

sentenced to suffer RI for 3 years and to pay a fine of Rs.3,000/-, in default, to suffer further RI for a period of six months. The accused is lastly convicted for offences under Sections 3 r/w 25 (1-b) (a) of the Arms Act and sentenced to suffer RI for 3 years and to pay a fine of Rs.1,000/-, in default, to suffer RI for a period of further 2 months. By the impugned Judgment and order, all the sentences inflicted upon the accused were to run concurrently.

2. The prosecution case in brief was as under :-

(a) That on 8.11.1998 while the trial in the bomb blast case was being conducted at Arthur road Central prison, the DCB, CID Bombay received information from an informer that the present accused D.K.Rao, deceased Raja Gore alongwith their associates who were all affiliated to the gang of Chota Rajan were going to commit a murder of a person who was an accused in bomb blast case, after office hours of the bomb blast Court and for the purpose of committing such murder, they would come in a white colour Maruti (1000 make) car bearing no.MH-04-N-4921 and would chase the accused whom they intended to kill from Arthur road central prison after such office hours.

(b) On receiving this information the then ACP of the DCB, CID Shri Dashrath Avhad called a meeting of

several officers at the Juhu Beach police chowki. Amongst the officers present in the said meeting were Sr.P.I. Ambadas Pote, (PW 2) PI Sunil Deshmukh, PI Satish Karkare, PI Dyaneshwar Shinde, (PW 1) PI Rajendra Ghule, API B.R.Pille, API Pirjade, PSI Kandalgaonkar, PSI Gangawave, PSI Wahval, (PW 3) Head Constable Betkar, PN Gaikwad and Women police constable Usha Rao. Amongst the people who had assembled at the Juhu police chowki for this meeting, (PW 1) Rajendra Ghule knew the accused D.K.Rao and deceased Raja Gore as he had arrested them while he was attached to the Juhu police station in the year 1995-96. In the said meeting, ACP Avhad told the assembled group about the secret information received by DCB CID office and there was discussion about how to lay a trap and nab these likely assailants.

(c) After the meeting, police made arrangement for vehicles and started making arrangements for laying the trap. They were provided weapons and bullet proof jackets and they were asked to maintain vigilance outside the Arthur road central prison from 9.11.1998 and such vigil was thus maintained till 11.11.1998 when the incident in question occurred.

(d) On 11.11.1998 as per the directions of ACP Avhad several police officers again assembled at Juhu

police chowki at about 2.30 P.M. and from there in various police vehicles they started towards the Arthur road central prison.

(e) (PW 1) Rajendra Ghule left Juhu police chowki in a police Jeepsy vehicle bearing No.MH-01-4422. In this jeep Sr.P.I. Pote, PI Deshmukh, API Pillye, PSI Kandalgaonkar, Constable Rane and one more Sub inspector, totalling 7 persons travelled towards the Arthur road central prison. API Avhad started in his Ambassador car alongwith his driver. A 2nd team of police officials started in a maruti car bearing No.DMR 5537. Persons in this team consisted PI Karkare, PI Shinde and 2 other officers alongwith one Head constable Betkar. A 3rd team consisting of police constable Gaikwad was on a motor cycle with Woman police constable Usha Rao as a pillion rider. These 4 vehicles travelled towards Arthur road central prison.

(f) On reaching the prison they noticed one white colour Maruti car (1000 make) bearing no.MH 04-N-4921 parked near Kermani building, which is opposite the road abutting the Arthur road central prison. Nobody was present inside the car. The police officers went to the office of DCB CID unit-II and at this place ACP Avhad gave further instructions about the trap. The teams then started towards Arthur road central prison.

(g) On reaching the Arthur road central prison, (PW 1) API Rajendra Ghule who was driving the police Jeepsy vehicle parked the Jeepsy in front of the jail quarters and started a watch. The police car of Maruti (1000 make) bearing NO. DMR 5537 parked at some distance at the back side of the white Maruti 1000 car MH-04-N 4921. PC Gaikwad and WPC Usha Rao parked the motor cycle near Vandana hotel which was in the corner of the junction abutting Arthur road central prison.

(h) When the 3 police teams were keeping a watch as above, at about 4.45 P.M. (PW 1) Rajendra Ghule saw deceased Raja Gore get into the driver seat of the white maruti car bearing No.MH-04 N.4921. He then saw the present accused D.K.Rao occupy the seat behind the driver. Two other persons occupied the rear seat and one person occupied the seat by the side of the driver. Accused Raja Gore started the Maruti car, took a U-turn towards Arthur road jail and proceeded towards Arthur Road Naka. (PW 1) Rajendra Ghule started his Maruti Jeepsy and followed the said maruti car. The other 2 police vehicles also followed the maruti Jeepsy. At Arthur road junction Naka accused Raja Gore driving the maruti car took left turn towards Lower parel and continued to proceed further via N.M.Joshi marg, till he came to Gokhale road in south Dadar. At

Gokhale road there exists the office of Zandu Pharmaseuticals Company where there was heavy traffic and therefore, accused Raja had to stop his maruti car. At this spot, (PW 1) API Rajendra Ghule overtook the maruti car driven by Raja Gore from the left hand side and blocked the said maruti car by the police jeepsy.

(i) Three police teams got down from their vehicles and surrounded the vehicle driven by Raja. PI Pote informed the persons in the maruti car that they were from the police and that all the persons in the car should surrender. At that time Raja ignoring the warning of PI Pote, fired on API Rajendra Ghule from his pistol and the bullet hit the right side chest of (PW 1) API Rajendra Ghule API Rajendra Ghule however, was wearing a bullet proof jacket and thus the bullet hit the jacket worn by him. In the meanwhile, while API Rajendra Ghule was covering the door on the right side of the maruti car alongwith (PW 2) Sunil Deshmukh, PI Pote & API Pilley covered the left side and rear side door respectively. PSI Waval and Constable Rane were on the front side of the suspected car. Sr.P.I.Karkare and PI Shinde were giving cover from the right side back. API Pirjade and PSI Kandalgaonkar covered the left side back and PSI Gangawane and Constable Betkar were on the rear side of the suspected car., Before Sr.PI Pote completed his warning, the present accused who

was sitting behind the driver on the rear right side picked up the pistol which was lying down, opened the door and simultaneously opened fire from the pistol on (PW 2) Sunil Deshmukh and he came out of the car while firing. The accused also fired at Head constable (PW 3) Suresh Betkar and the bullet fired by the present accused hit the bullet proof jacket worn by the said Police Head Constable.

(j) On such firing coming in their direction from the car, the police officials also opened fire. (PW 1) Rajendra Ghule and (PW 3) Suresh Betkar were armed with automatic weapons being carbines of 9 mm bore. Other police officers were armed with police revolvers of .38 bore. Because of such heavy police firing all the 5 persons in the maruti car sustained injuries and fell on the ground. (PW 1) Rajendra Ghule went near accused Raja and took the pistol from his hands. One of the police officers phoned the wireless mobile van and when such wireless van arrived the injured persons from the maruti car were taken to KEM hospital. Out of the 5 persons from the maruti car, the doctor declared Raja and 3 other persons whose names were then unknown as dead before admission. The accused D.K.Rao was admitted for further treatment. At KEM hospital (PW 1) API Rajendra Ghule learnt that API Pille also sustained a bullet hit on his jacket and PSI Kandalgaonkar has been assaulted by a chopper and had sustained an

injury. That API Pille and PSI Kandalgaonkar had been sent to Nagpada police hospital for treatment. He further learnt that a Police Constable had also sustained injury and had been sent to Nagpada police station.

(k) (PW 9) Police officer Satish Shingate and other police staff of Dadar police station came to KEM hospital for enquiry as the incident has taken place within the jurisdiction of Dadar police station. FIR (Exh.22) of API Rajendra Ghule was recorded by PI Shingate (PW 9). While his statement was being recorded API Ghule handed over the pistol which he has taken from the accused Raja to (PW 9) PI Shingate. The said pistol taken from Raja was having a mark as ‘Star pistol’ and bore No. AB 786 (article-1). Of the 4 live cartridges found therein, 2 were used for test firing and the live cartridges with empties were produced in the Court and marked (Article-2 colly).

(l) While his FIR was being recorded API Rajendra Ghule also handed over his bullet proof jacket to PI Shingate. During the investigation (PW 2) Sunil Deshmukh had collected 6 empty cartridges from his .38 revolver and he handed them over to PI Shingate. (PW 2) Sunil Deshmukh had also dis-armed the present accused and kept his weapon at the spot near the car. He had asked PI Shingate to look after the

said weapon of the accused.

(m) In the course of investigation, on 11.11.1998 from 8.45 p.m. till 10.00 p.m. a spot panchanama of the scene of offence (Exh.33) was conducted by (PW 8) API Sidharth Kasbe, (PW 5) Bharat Vora was the spot panch. Several articles were found at the spot of the offence and these were recorded in the spot panchanama. Amongst the articles found was a hand bag which contained 4 cell phones, telephone diary, two yellow tissue papers with writing thereon. Writing on one of the tissue paper contained the word " 11.00 am, MH-01-974 Attesham, Shivsena Colour tank, Yamaha Aachal." There were also other articles like visiting cards, wrist watch and cash of Rs.150/-. One more mobile phone was found in the car and on the back seat a chopper was found. Again on the back seat 3 pieces of lead with blood stained on them were found. On the left side of the car a pistol having no.M 4830 (article 19) with 3 live cartridges therein were found. Around this pistol on the left side of the car 4 empties of 7.63 bore bearing legend GFL mauser and 4 empties of 9 MM bearing legend KF 949 MMZZ were found. On the right side of the Maruti 1000 car at the distance of about 1 & 1/2 feet was found a 9 M.M. pistol bearing no.4001 .6055 (article 4). This was a pistol made in china and in this pistol 3 live cartridges were found, one being in the chamber and

2 being in the magazine. Around this pistol on the right hand side, were 10 empties of 7.63 bore and 6 empties of 9 M.M. bore. Near these 16 empties found on the right hand side was another mobile phone bearing no.9820089220. One chopper was also found near the gate of Zandu Pharmaseutical and along side this chopper was found another mobile phone having no.982114807. At the spot all the articles which were found were packed in plastic bags which were again put in a khakhi coloured paper which was sealed by paper labels signed by the panch and the police. These articles were also seized with the seal of the Dadar police station at the spot. (PW 8) Sidharth Kasbe who was officer incharge, handed over these articles to (PW 10) Uday Shinde of Dadar police station.

(n) In the meanwhile, PSI Satish Shingate attached to the Dadar police station had been conducting the inquest panchanama in respect of the 4 dead persons at KEM hospital. In the inquest panchanama the injuries found on the 4 dead bodies were described. 3 of the dead bodies were shown to be of un-known persons. The clothes were seized from the dead bodies. On one of the bodies of an then un-known person (later identified by the police as Bipin Khandpal) a star pistol of 7.63 bore bearing No. PEO 154-0154 1972 (article 17) was found. One live bullet of .763 was found therein. All these

articles were taken into custody by the police and were sealed under a panchanama. The dead bodies were then sent for post mortem and it may be mentioned here that in the course of the post mortem, 3 entry bullet wounds were found in the body of Raja. Three entry bullet wounds were found on each of the body of 2 un-known person and 4 entry wounds were found in the body of the 3rd un-known person. As far as present accused was concerned, on medical examination it was found that there were 3 entry wounds and 1 exit wound, while 2 bullets were lodged in his body.

(o) After returning to the police station (PW 9) PI Shingate recorded the statement of the members of the team of crime branch, i.e. statement of ACP Avhad and ors. On 12.11.1998 PI Shingate visited Nagpada police hospiral and recorded the statements of API Raju Pilley, PSI Kandalgaonkar and Police Havildar Suresh Betkar who were admitted there and took charge of the life jackets worn by API Raju Pilley and police Havildar Suresh Betkar. Thereafter he handed over the investigation to (PW 10) ACP Uday Shinde on 14.11.1998.

(p) On 14.11.1998 after taking over the investigation, Sr.Police inspector Uday Shinde traced the ownership of the car bearing no.MH-04/N 4921. He found that the real number of the said Car

was MH-01/T-8524 and the said car has been stolen from the jurisdiction of D.N.Nagar police station, regarding which complaint has been registered in the said police station under C.R.No.291/98. He found that the owner of the said car was Adwani Orelikon Limited Company. A representative of the owner of the car came to the police station and claimed the car and after taking photographs of the car used in the crime under the said fake number MH04/N-4921 the car was returned to its owner. He then went near the spot of the offence and recorded the statement of persons around the spot of the offence. He also recorded the statement of one Etheshyam Mohammed Shaikh Haji Gulam Rasool (PW 4), collected the bullet material taken out from the body of the deceased and injured from KEM hospital. He received the said material on 16.11.1998 in a sealed packet and he made entry in the muddemal register regarding the same.

(q) On 17.11.1998 Sr.P.I. Uday Shinde sent all the sealed articles to C.A. under his covering letter and in due course received a C.A's report on 4.1.1999 (Exh.62). He also sent all the X-ray plates of all the accused to the C.A. under a covering letter dated 7.9.1998 and in response he received 3 C.A. reports dated 26.4.1999 and one C.A.report dated 22.10.1999 (Exh.64 colly & Exh.65).

(r) On 17.11.1998 the accused was discharged from K.E.M.hospital and was arrested by the (PW 10) Sr.P.I. Uday Shinde. He then collected injury certificates of the injured who were admitted in Nagpada police hospital (Exh.38 to 40). He also obtained injury certificate of accused D.K.Rao. He took steps to obtain the sanction from the concerned authority and after receiving the sanction order dated 29.1.1999 (Exh.66) he filed a charge-sheet in the Court of the Metropolitan Magistrate, Bhoiwada on 2.2.1999.

(s) In due course after the matter was committed to the Court of Sessions and charges were framed, the trial commenced. In the course of the trial the prosecution examined 3 eye witnesses (PW 1) API Rajehdra Ghule, (PW 2) PI Sunil Deshmukh & (PW 3) PHC Suresh Betkar. (PW 5) Bharat Vora who was the panch to the spot panchanama was examined. (PW 6) Dr.Vijay H. Kelvekar was examined to prove the injuries sufferred by 3 police officers and (Pw 7) Dr.Smt. Minakshi Jambulkar was examined to prove the injuries on the present accused. One witness (PW 4) Shaikh Mohd. Ethesham Gulam Rasool was examined by the prosecution as he was the possible intended target of the accused and others in the maruti car because he used to drive a motor cycle belonging to his brother which bore the number found on the yellow chit in the bag seized from the spot

of the offence. 3 police officers were examined and they were (PW 8) Sidharth Kasbe who had conducted the spot panchanama, (PW 9) PI Satish Shingate who had taken over the investigation and (PW 10) Sr.P.I. Uday Shinde who was yet another I.O. After examining in all 10 witnesses the prosecution closed its case.

(t) The accused who had pleaded not guilty to the charge took a defence of total denial. He has not come out with any specific version as to how the incident occurred. From the cross-examination of the various eye witnesses as well as from his 313 statement, there does not emerge any definite counter version of the manner in which the shooting took place. He has restricted himself to stating that police officers were deposing against him because he had threatened to complain against them for the injuries sufferred by him. Beyond this statement there is absolutely nothing in the 313 statement to throw positive light as to how the incident actually occurred.

(u) After recording the 313 statement and after appreciating the entire evidence, both oral and documentary produced on record, the Additional Sessions Judge, Gr.Bombay passed the impugned Judgment and order convicting and sentencing the sole accused as aforesaid. Being aggrieved by the

said judgment and order, the accused filed the present appeal in this Court.

3. On behalf of the appellant it was argued that this was a case of a fake police encounter. The stand was taken that the incident did not occur at the spot of the offence at all. That the accused and others were caught and shot by the police at some other spot and it was falsely shown that the incident had occurred at the place of the incident. Reliance was placed upon several lacunas in the investigation. It was pointed out that the .38 revolvers which various police officers had on their person and which was used in the incident were not taken charge in the panchanama. The nine mm carbines had not been taken charge of under panchanama. That the panch turned out to be over-enthusiastic witness who went on to identify all the 4 pistols though he was a panch to the panchanama in which only 2 pistols were found at the spot. That even (PW 8) PI Sidharth Kasbe was committing serious mistakes about the identification of pistols which were actually found on the spot and had wrongly identified one of the pistols in his substantive evidence. It was sought to be contended that the bullet proof jackets said to have been worn by the police officers were not sealed under a panchanama. That the entire investigation was biased, unfair and one sided and was conducted with

a view to concealing the truth rather than bringing the truth on the record. Other lacunas such as lack of blood on the chopper, non examination of injured police officers like P.I.Pilley, PI Kandalgaonkar were yet other suspicious circumstances. That though PI Shinde admitted that statements of several independent persons in the locality had been recorded, no such person has been examined as a witness in the Court. It was contended that the entire evidence was partison evidence of police officers who were interested parties. Grievance was made that the prosecution has failed to examine ACP Avhad which threw the cloud on the origin of the entire police action & prosecution story.

4. On behalf of the prosecution, the APP supported the reasoning which was given by the trial Court. He argued that the police officers had no enemity with these accused persons who belonged to a deadly gang and whose antecedents were known to the police. He argued that the entire evidence including the finding of several empties and the guns could not have been fabricated. He relied upon the evidence of the medical officer to indicate that injuries had been found on the 3 police officers corresponding to the bullet marks found on the chest jackets. He relied upon the C.A.report which indicated that the empties found on the spot were found to belong to bullets fired from the pistols found at the spot as

also the pistol seized from Raja Ghule. It was contended that articles like bullet proof jackets etc. were sent to the C.A. in a sealed condition and were taken back under a bond as they were required in daily duties. In short, it was contended that the police were not interested parties and their evidence could be accepted as reliable and as evidence on the basis of which conviction could be based.

5. Having heard both sides at length and having considered the entire material on record, I am of the view that benefit of doubt will have to be given to the accused and accused will have to be acquitted for the following reasons.

(A) It is the prosecution case that DCB CID had received information that Raja Ghule the present accused D.K.Rao and their associates were going to commit murder of an accused in a bomb blast case and that in pursuance of this information received by the police, ACP Dashrath Avhad had a meeting of several senior police officers at Juhu Beach police chowky. There is no documentary evidence or any entry in any station diary or register to substantiate this fact. (PW 1) API Rajendra Ghule admitted that head office of DCB CID maintained a station diary and register and ACP Dashrath Avhad was attached to the head office of DCB CID. He

stated that ACB Avhad had only orally informed them about the information received by him. He admitted that unit-10 of DCB CID with whom he was working did not note down this information in any register. (PW 1) Rajendra Ghule further stated that he did not verify from ACB Avhad as to how he has received the information and as to whether information was received by phone or by informant. He admitted that while recording his FIR he did not disclose the name of the accused in the bomb blast case who was to be assaulted. He then stated that ACB Avhad vaguely informed the police officer that accused in bomb blast case would be killed by these accused. I find it difficult to believe this story given by the police witnesses. The prosecution has not examined ACP Avhad who was the person who was supposed to have received this information. If some accused in the bomb blast case was likely to be killed, the natural conduct would have been to give protection to all accused persons or atleast to inform the Special Judge who was hearing the case. It is not the prosecution case that any such steps were taken. In this regard the prosecution has examined (PW 4) who is a person by name Shaikh Mohd. Ethe sham Haji Gulam Rasul. (PW 4) was accused in the bomb blast case and it appears that he was examined because of the contents of a chit found in the bag recovered from the maruti car in which the accused were travelling. The evidence of this witness indicates

that he used to go daily to the Court by motor cycle of his brother. He has given his brother motor cycle number as MH-01 974 and has stated that colour of the motor cycle was saffron (shiv sena colour). This number of the motor cycle and colour tallies with the contents of the yellow chit said to have been found in the bag seized from the car. However, investigation in this regard was not carried to its logical conclusion. There does not appear on the record any documentary evidence such as registration certificate to indicate that motor cycle no.MH-01 974 belonged to the brother of (PW 4). The said brother who is said to be the owner of the motor cycle is not examined. This evidence is therefore, inconclusive in its support to the alleged plan to kill a bomb blast accused. There is nothing on record to show as to what motive the accused persons would have to kill (PW 4) in particular amongst the several accused in the bomb blast case. I am therefore, not inclined to accept this story of the police about keeping a vigil. Possibility exists that the police were aware through their own sources that the accused persons could be found and accosted at some specific place.

(B) Coming to the incident in question the police are said to have fired in retaliation to the firing by the accused and his associates. The version as given by the police officers is not acceptable for

several reasons and particularly as it confilcts with several circumstances found at the scene of the offence. The police found 2 pistols of 7.63 bore and of star make at the scene of offence. One pistol was found on the left hand side of the car and another pistol was found on the right hand side of the car. A 3rd pistol of the same 7.63 bore was taken away by (PW 1) API Rajendra Ghule from the hands of the deceased accused Raja and handed over to (PW 9) PI Shingate. One pistol, which the C.A. has found to be 9 MM bore was found in the waist of the pant of the deceased accused Bipin Khandpal when his inquest was conducted at the KEM hospital. At the scene of offence 4 empties of 7.63 bore and 4 empties of 9 MM bore were found on the left side of the car and 10 empties of 7.63 bore with six empties of 9 M.M. bore were found on the right side of the car. In so far as the pistols which are used by the accused, the 9 MM empties which were found on the right side of the car have not been established to belong to the only 9 MM pistol which was seized from Bipin Khandpal. The C.A.'s report only states that these empties which were Exh.8-A, 8-B, 8-C & 8-D and (12-A, 12-B, 12-C, 12-D, 12-E & 12-F) were fired from a .9 MM pistol. The 9 MM pistol taken from the body of one of the deceased accused Bipin Khandpal was article 70 as produced in the Court (Exh.3) before the C.A. The C.A.'s report does not indicate that any of the 9 mm empties found at the scene of

offence were found to have fired from the pistol of 9 MM said to have been carried by one of the deceased Bipin. The question thus arises as to which gun the .9 MM empties found at the spot would be related. It was suggested by the APP that these empties must have been the empties in relation to bullets from the 9 MM carbines which were fired by (PW 1) API Rajendra Ghule and (PW 3) Suresh Betkar. Unfortunately this cannot be established because the police have neither seized those 9 MM carbines guns nor sent them to the Forensic Science Laboratory for analysis. Then again the analysis of the C.A's report indicates that from the various empties of 7.62 MM found at the spot, 4 empties bearing Exh.7-D, 11-H, 11-I, & 11-J were fired from 7.62 MM pistol (article-1) said to have been taken from Raja Ghule. The further finding is six empties bearing Exh.7-C, 11-A, 11-B, 11-C, 11-D & 11-F were fired from the 7.62 MM pistol carried by unknown deceased and found on the left side of the maruti car. That 4 empties bearing 7-A, 7-B, 11-E & 11-G were fired from the 7.62 MM pistol (article-4) said to have been fired by the present accused. The evidence indicates that empties nos.7-A to 7-D were found on the left side of the car and empties at Exh.11-A to 11-J were found on the right hand side of the car. The evidence of the police witnesses clearly indicate that the different accused got down on different sides of the car and immediately engaged

the police party which retaliated by heavy firing at the accused. If this story were to be accepted then the bullets fired by each of the accused persons from the gun in his possession ought to have been found on the same side of the car. C.A. report however, belies this fact and indicates that some of the empties in the case of each of the 3 guns said to have been fired by the accused had been found to be on the opposite side of the car. I have given anxious consideration to the possibility that some of the empties might have rolled under the car to the other side by the force of their ejection. However, it appears that each of these empties are not perfectly circular and C.A. has found that they were bottle shaped. Such empties could not have rolled over from under the car. The version given by the police witnesses is thus belied by the circumstances at the scene of the offence and cannot be accepted as gospel truth.

(C) Yet another circumstance to test the theory of the accused having fired upon the police party first was the damage caused to 3 bullet proof jackets which were said to have been hit by bullet shots fired by the various accused. Unfortunately none of these 3 bullet proof jackets were taken into custody by the police under a panchanama. It appears that they were produced in the Court only at the stage of evidence and were allowed to be taken back by the

Sessions Judge who was hearing the trial at the stage of evidence itself. I intend to make some comments regarding this practice followed by the trial Court. The net result of this procedure is that these jackets are now not available before me for inspection. These 3 bullet proof jackets were sent to the C.A. and were amongst the 53 exhibits sent in 47 sealed parcels and were in sealed condition. It is not known who has sealed these jackets as these 3 jackets have never seized under the panchanama. C.A. report while dealing with the three bullet proof jackets at referred to Exh.23 to 25, do not state that any of these 3 jackets had a bullet hole on them and there is no such finding even in the analysis of the C.A.

(D) That brings us to the identification of the 4 pistols said to have been used by the accused and his associates. It is the case of the prosecution that a pistol bearing no.M-4830 was found on the spot of the offence on the left side of the car. This was produced in evidence and marked (article-19). Another pistol bearing no.4001 .6055 marked as article-4 by the trial Court was said to have been taken by (PW 2) PSI Sunil Deshmukh from the hands of the present accused D.K.Rao and kept on the side. A 3rd pistol being the only pistol of 9 mm bore was produced at article-17 in the court and had no.P-3 019 1973. This was taken from the body

of deceased Bipin Khandpal at the time of the inquest panchanama. It is found that this 4th pistol 786 produced in the court as article-1 was taken from the deceased associate Raja by (PW 1) API Rajendra Ghule and handed over to the I.O. (PW 9) Satish Shingate. It is thus clear that of these 4 pistols, the pistol article-19 bearing M-4830 and pistol .400 6005 (article 4) were the pistols found at the spot of the offence and seized under the scene of the offence panchanama. However, substantial evidence as relating to the identification of various pistols is contradictory not only to the spot panchanama but also with each other. The panch witness (PW 5) Bharat Vora who was a panch of the spot panchanama has identified all the 4 pistols in his substantive evidence. He has wrongly identified pistol no.TE 0154 1972 (article-17) though he had no occasion to see that pistol which was taken from the vest of Bipin during the inquest panchanama. He has also wrongly identified the pistol bearing no.AB 786 (article-1) said to have been taken by (PW 1) API Rajendra Ghule from Raja Ghole and handed over to (PW 9) Satish Shingate. Obviously panch had no occasion to see this pistol which had been taken away by (PW 1) Rajendra Ghule. It appears that all the pistols were identified by the panch and though he was concerned with only 2 pistols found at the scene of the offence. It was contended by the APP that the

panch witness might making mistake while identifying all pistols or was overenthusiastic, but I find that the concerned police officer (PW 8) Didharth Kasbe who was obviously a person who ought to have been well-versed with pistols has committed similar mistake relating to identification. Firstly in his evidence he has not identified (article-4) which was found at the spot at all. No such question was even put to him in his examination-in-chief. He then wrongly identified pistol bearing AB 786, which was taken by (PW 1) Rajendra Ghule from Raja and handed over to (PW 9) Satish Shingate, as the pistol which was seized at the spot of the offence. None of the police witnesses throw any light as to who was carrying pistol (article-19) M 4830 found at the spot of the offence. To say the least the entire prosecution evidence relating to the identification of the various pistols said to have been carried by the accused and his associates is unreliable for the reasons which are stated here-in-above. No efforts were taken to obtain and match finger prints on any of the four pistols and the two choppers seized in this case and when the I.O. was asked about this, he stated that he did not feel that the taking of such finger prints was necessary.

(E) It is the evidence of (PW 10) Sr.P.I. Uday Shinde that after he took over investigation from (PW 9) Satish Shingate, he visited the spot of the

offence and recorded the statements of several neighbours. However, at the stage of the trial no such evidence of any independent person was led by the prosecution. In this regard the trial Court observed that the evidence of such witnesses is not necessary and it was for the prosecution to decide what evidence was to be led in the matter. Even if that may be true, one cannot lose sight of the fact that existence of evidence from independent person could have lent more credibility to the prosecution case. The trial Court then also gave a speculative finding that adjoining shop-keepers are not examined though their statements were recorded because due to the terror of the accused such witnesses would have turned hostile and such tendancy was generally found when notorious criminals who are having terrorist connection. It was never the prosecution case that any of the independent shopkeepers who had witnessed the incident which took place in broad day light has been terrorised by the accused or his associates.

(F) It is the prosecution case that 2 choppers were found at the scene of the offence and that one of these 2 choppers was used to injure PSI Kandalgaonkar who sustained the chopper injury on his left hand. PSI Kandalgaonkar was not examined by the prosecution. Medical evidence of the doctor who examined the police officer is at complete variance with the evidence of Suresh Betkar.

According to the doctor she examined Kandalgaonkar and he gave alleged history of bullet injury. She certified the injury as due to hard and blunt substance. It may be stated here that the two choppers were sent to the C.A. but no blood was detected on the same.

(G) It may be further stated here that none of the several revolvers of .38 bore or the empties fired by from weapons were seized by the police under the panchanama. Normally speaking these empties should have been found at the scene of the offence. However, it is the case of the prosecution that each of the police officers picked up their own empties and took them away, which is rather strange.

(H) The prosecution relied upon some injuries said to have been suffered on the person of 3 police officers. However, all these are in the nature of small contusions on the chest of PHC Betkar and API Pillay and contusions on the left forearm of PSI Kandalgaonkar. In the cross-examination however, Dr.Vijay Kelvekar (PW 6) contended that the case papers were not available as they were destroyed due to termites and leakage of water. In the absence of believable proof regarding damage to the bullet proof jackets actually worn and in the absence of any documentary medical evidence which is said to have been destroyed by termites and water leakage, I

am not inclined to accept this evidence.

6. One observation which I wish to make before passing the operative order is that the Additional Sessions Judge who heard this case has returned muddemal articles like bullet proof jackets at the stage of evidence. Certain other articles which were part of the muddemal property like a pistols, live cartridges and several other articles which were seized from the scene of offence such as mobile hand sets, wrist watches etc. were forfeited to the State and not preserved atleast till the appeal period is over. I would like to observe that this is not a correct practise as the appellate Court is deprived of the opportunity of inspecting such articles. I would have greatly preferred to inspect the various guns in order to find out whether they were all of similar make and colour that would have helped me in my observations relating to mistaken identity of the guns. I feel that such practise should not be followed. In the circumstances, I feel that copy of this Judgment and order should be forwarded by the office to the Principal Judge, City Civil Court, Gr.Bombay, with a direction to forward the same to the concerned Judge for future reference.

6. Though I have acauitted the accused by giving him benefit of doubt that should not be construed to

mean that I have accepted the contention that the entire incident was a got up and fabricated incident. It may be that the police officers could have conducted the enquiry with more care and diligence but it must be born in mind that this is a case in which neither the accused nor anybody else made any complaint against the police officers. During the cross-examination on behalf of the accused there was no suggestion that this was a case of a fake encounter. Even in the 313 statement accused has not given any version which is contrary to the prosecution story and as stated earlier has not come out with any other positive story as to how the incident actually occurred. The argument that this was a fake encounter and that the entire evidence has been fabricated is therefore, rejected as without any foundation.

7. In the net result, appeal is allowed. The conviction and sentences against the accused are set aside and the accused is acquitted of all charges. The fine if paid, will be liable to be refunded. The accused may be released if not required to be detained in any other crime or under any law relating to preventive detention. Muddemal articles which exist should be preserved for further period of 90 days which is the period during which the State may file appeal if they so desire.

(R.S.Mohite,J)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE SIDE

CRIMINAL APPLICATION NO.1240 OF 2005
IN
CRIMINAL APPEAL NO.970 OF 2004

Ravi @ Akash @ D.K.Rao Mallesh Bora ..Applicant
Versus
The State of Maharashtra ..Respondent

Mr.P.M.Pradhan with Kuldeep S.Patil & Mahesh Mule for the applicant.

Mr.K.V.Saste APP for the State.

Coram : R.S.Mohite,J

Date : 03.08.2006.

PC

. As the main appeal has been allowed today, this application does not survive and has become infructuous and disposed off as infructuous.

(R.S.Mohite,J)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
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Mr.K.V.Saste APP for the State.

Coram : R.S.Mohite,J

Date : 03.08.2006.

Operative order :-

. For the reasons separately recorded in the Judgment, I proceed to pass the following order :-

O R D E R

. In the net result, appeal is allowed. The conviction and sentences against the accused are set aside and the accused is acquitted of all charges. The fine if paid, will be liable to be refunded. The accused may be released if not required to be detained in any other crime or under any law relating to preventive detention. Muddemal articles which exist should be preserved for further period of 90 days which is the period during which the State may file appeal if they so desire.

(R.S.Mohite,J)